

## SETTLEMENT AGREEMENT

This SETTLEMENT AGREEMENT ("Agreement") is made and entered into in San Mateo County, California, as of August \_\_\_\_, 2005, by and among the CITY OF HALF MOON BAY and CITY COUNCIL OF THE CITY OF HALF MOON BAY (collectively, "City"), on the one hand, and, WAVECREST VILLAGE LLC ("Wavecrest"), on the other hand, with reference to and based upon the following:

### RECITALS

A. On or about August 30, 1999, the City and Wavecrest entered into a Development Agreement for the Wavecrest Village Project pursuant to Government Code sections 65864 *et seq.* ("Development Agreement"). Under the Development Agreement, the City approved a project which includes 225 market-rate and 46 affordable residential units, along with certain retail, commercial, office or other uses, open space, a Boys and Girls Club, a Middle School, a community garden and ball fields (the "Project"). Along with the Development Agreement, the City approved a Specific Plan, General Site Plan, use permits, vesting tentative maps, Coastal Development Permits ("CDPs") and other approvals for the Project (discussed in Exhibit I to the Development Agreement, "Project Approvals").

B. The California Coastal Commission ("Coastal Commission") has jurisdiction to review appeals of certain City-issued CDPs for development in the Pacific Ocean coastal zone. In September 1999, the CDPs for the Project were appealed to the Coastal Commission, and that appeal is still pending.

C. Section 8(d) and other provisions of the Development Agreement govern modifications to the Project in response to, among other things, permitting requirements or approval conditions of the Coastal Commission. The parties have disagreed over the proper interpretation of Section 8(d) of the Development Agreement in the event the Coastal Commission modifies the CDP for the Project. The legal positions of the parties are reflected in their pleadings in the litigation described in Recitals E and F. The parties acknowledge that this Agreement does not resolve the parties' disagreement over Section 8(d), which may need to be resolved in future litigation.

D. Section 12 of the Development Agreement calls for the City to conduct an annual review of the compliance of the developer with the terms of the Development Agreement. On or about December 19, 2002, the City Council adopted Resolution C-83-02, finding Wavecrest out of compliance with the terms and conditions of the Development Agreement. On or about October 21, 2003, the City Council adopted Resolution C-75-03, finding Wavecrest in default of the Development Agreement. The actions described in this paragraph are hereafter defined as the "2002 Non-Compliance Determination."

E. On October 27, 2003, Wavecrest filed a Verified Petition for Writ of Mandamus and Complaint for Damages and Declaratory Relief against the City entitled Wavecrest Village LLC v. City of Half Moon Bay, et al., San Mateo Superior Court Case

No. Civ. 435208. On December 22, 2003, Wavecrest filed a First Amended Petition for Writ of Mandamus and Complaint for Damages and Declaratory Relief ("First Amended Petition"). On July 20, 2005, Wavecrest filed a Verified Second Amended Petition for Writ of Mandamus and Complaint for Damages and Declaratory Relief ("Second Amended Petition"). San Mateo Superior Court Case No. 435208 is hereafter referred to as "the Action."

F. On March 12, 2004, the City filed an Answer to the Petition, in which the City denied all of the allegations in the Petition and asserted affirmative defenses. As of the date of this Agreement, the City's response to the Second Amended Petition is not yet due, and the City has not yet filed its responsive pleading to the Second Amended Petition.

G. On or about December 31, 2003, the City's Planning Director made another determination that Wavecrest was not in compliance with the Development Agreement. On or about February 26, 2004, the Planning Commission upheld this determination. Wavecrest has appealed this determination to the City Council, which, with the consent and support of Wavecrest, has not yet taken action on the appeal. The actions described in this paragraph are hereafter defined as the "2003 Non-Compliance Determination."

H. On or about July 7, 2004, the parties entered into a Stipulation and [Proposed] Order to Stay Judicial Proceedings, filed in San Mateo Superior Court Case No. 435208 (the "Stipulation"), including Exhibits A, B and C attached thereto. In the Stipulation, the parties agreed on a modified Project as set forth in Exhibits A, B and C (hereafter, the "Modified Project"), which Wavecrest would submit to the Coastal Commission. A true and correct copy of the Stipulation, with exhibits, is attached hereto as Exhibit A and incorporated into this Agreement by reference. The parties acknowledge that the Modified Project has not yet been considered and approved by the Coastal Commission, and that, due to comments or direction from other Public Agencies (as defined in the Development Agreement), there may be further refinements and modifications to the Modified Project.

I. These recitals shall constitute part of the Agreement.

J. The parties believe that it would be in their respective best interests to settle their differences on the terms specified in this Agreement.

### AGREEMENT

Based upon the above recitals, it is mutually agreed upon by and among the parties hereto as follows:

1. Joint Cooperation/Support for Modified Project. The City and Wavecrest hereby agree and confirm that the Development Agreement imposes joint obligations on the parties to cooperate with each other and support the Modified Project and the

submission of the Modified Project to the Coastal Commission. The parties' support for the Modified Project shall not constitute a waiver by either party of any argument regarding the meaning of Section 8(d) in the Development Agreement.

2. Communications Protocol. The City and Wavecrest hereby agree to the following communications protocol regarding any submissions to the Coastal Commission or any Public Agencies regarding the Modified Project:

(a) The City and Wavecrest shall each make a reasonable effort to collaborate in preparing any document to be submitted to any Public Agencies.

(b) Three business days prior to the submission of any document to any Public Agencies, each party shall provide the other party with a copy of such document for their review and comment. The party receiving the document shall have one business day to provide the other party with any comments or objections.

(c) Each party shall provide the other party with three business days written notice prior to any meeting with any Public Agencies. Such notice shall specify the date, time and location of the meeting, as well as the reason for the meeting and the probable attendees. The party receiving the notice shall have one business day to elect to attend such meeting if the meeting concerns a matter involving the type of development, location of development, density of development, configuration of internal roadways or project entrances, open spaces areas, mitigation for wetlands or species issues.

(d) For purposes of this Paragraph 2, any communications shall be provided via facsimile, e-mail or hand delivery. Any communications with the City shall be provided to the City Attorney ([alindgren@meyersnave.com](mailto:alindgren@meyersnave.com) and [akulkarni@meyersnave.com](mailto:akulkarni@meyersnave.com); fax: (510) 444-1108), City Manager ([dryan@ci.half-moon-bay.ca.us](mailto:dryan@ci.half-moon-bay.ca.us); fax: (650) 726-9389) and City Council Ad Hoc Subcommittee ([jgrady@calcas.com](mailto:jgrady@calcas.com); fax: (650) 572-4658 and [MJFerreira@aol.com](mailto:MJFerreira@aol.com); fax: (925) 726-3575). Any communications with Wavecrest shall be provided to Larry G. Atkinson ([larry@concar.com](mailto:larry@concar.com); fax: (650) 574-1207), William E. Barrett ([webarrett@sbcglobal.net](mailto:webarrett@sbcglobal.net); fax: (650) 364-9131), Julia Baigent ([Julie@jbaigent.com](mailto:Julie@jbaigent.com); fax: (650) 364-9131) and Bruce J. Russell ([brussell@kenmark.com](mailto:brussell@kenmark.com); fax: (650) 560-9198).

(e) If any party fails to comply with these requirements, or if a party objects to the documents submitted to or statements made by the other party to the Coastal Commission or other Public Agencies, either party may resort to the remedies in the Development Agreement.

3. Middle School and Boys & Girls Club. Recital H of the Development Agreement provides that the Cabrillo Unified School District has executed a purchase agreement to acquire a portion of the Property from the developers for construction of a junior high school campus (the "Middle School"). Recital J of the Development Agreement provides that the Coastside Boys and Girls Club is purchasing an approximately 3-acre portion of the Property from the developers for construction of a

Boys and Girls Club (the "Boys and Girls Club"). Wavecrest agrees that, notwithstanding anything to the contrary in the Development Agreement or in Paragraph 1 of this Agreement, the City may investigate and discuss with any interested person or agency zoning, environmental, traffic, fiscal and related factual matters involved in potential alternative Middle School and/or Boys and Girls Club sites; provided, however, that the Modified Project shall not be modified to eliminate the Middle School or the Boys and Girls Club without the prior approval of Wavecrest. Wavecrest agrees that such investigation and discussion by the City, in and of themselves, shall not constitute a breach of the Development Agreement by the City. The City agrees that should Wavecrest and the School District agree to move the Middle School, or should Wavecrest and the Coastside Boys and Girls Club agree to move the Boys and Girls Club, such actions, in and of themselves, shall not constitute a breach of the Development Agreement by Wavecrest.

4. Modified Project. The City and Wavecrest hereby confirm their support for the Modified Project, and agree to continue supporting approval of the Modified Project by the Coastal Commission and other Public Agencies. In addition, the parties agree as follows:

(a) The City and Wavecrest both acknowledge that the Modified Project may need further modifications if changes are imposed by the Coastal Commission or necessitated by other Public Agencies. By way of example only, such modifications might include relocation of the Middle School and/or the Boys and Girls Club, the residential lots may be increased, enlarged or reconfigured, habitat, wetlands or other conditions may require setback adjustments, or other changes. In the event further modifications to the Modified Project are required, then such modifications shall be addressed in accordance with the terms and conditions of the Development Agreement, including without limitation, Section 8(d).

(b) The City and Wavecrest agree that if further modifications, whether voluntary or required by Public Agencies or a court, to the Modified Project result in density or unit size reductions or involve additional project costs due to mitigation measures, exactions or approval conditions, the parties shall negotiate in good faith regarding a reduction in the public benefit components of the Modified Project in a proportional, fair and equitable manner. Conversely, the City and Wavecrest agree that if further modifications, whether voluntary or required by Public Agencies or a court, to the Modified Project result in density or unit size increases, the parties shall negotiate in good faith regarding an increase in the public benefit components of the Modified Project in a proportional, fair and equitable manner. The "public benefit" components shall mean the improvements and consideration described in the following paragraphs in Exhibit C to the Stipulation: Paragraphs 1 (Ballfields), 3 (Traffic Signal at Seymour), 4 (Corporation Yard), 6 (Streets), 7 (Installation of Trails), 8 (Open Space Maintenance) and 9 (Dedication of Open Space and Ballfields).

5. Compliance Determinations and Estoppel Certificates.

(a) Within 5 calendar days after full execution of this Agreement and simultaneously with issuance of the Estoppel Certificate (as defined in Paragraph 5(b) below), the City shall rescind the 2002 Non-Compliance Determination and the 2003 Non-Compliance Determination and issue Compliance Certificates to Wavecrest for the years 2002, 2003, 2004, and for 2005 up to the date upon which this Agreement is fully executed in the form attached hereto as Exhibit B ("Compliance Certificates").

(b) Within 5 calendar days after full execution of this Agreement and simultaneously with issuance of the Compliance Certificates, and pursuant to Section 22 of the Development Agreement, Wavecrest shall issue to the City an Estoppel Certificate in the form attached hereto as Exhibit C ("Estoppel Certificate").

(c) The parties agree that nothing in the Compliance Certificates and/or the Estoppel Certificate shall waive, release or otherwise affect any claims, disputes or controversies reserved by the City and Wavecrest in this Settlement Agreement including, without limitation, Recital C and Paragraph 6(b), 9 thereof, or any claims, disputes or controversies regarding agricultural use of any real property included as part of the Project.

(d) The parties agree that, once the Compliance Certificates and Estoppel Certificate are signed and issued, they are hereby incorporated by reference into this Settlement Agreement.

6. Dismissal of Action. Within 3 calendar days after the City's issuance of the Compliance Certificates and the 46 Measure As (as defined in Paragraph 7(a) below), and Wavecrest's issuance of the Estoppel Certificate, Wavecrest shall dismiss the Action and provide conformed copies of the Dismissal to counsel for the City, as follows:

(a) Wavecrest shall dismiss with prejudice the First Cause of Action for Writ of Administrative Mandamus, Second Cause of Action for Violation of Procedural Due Process, Fourth Cause of Action for Breach of Contract, and Fifth Cause of Action for Specific Performance.

(b) Wavecrest shall dismiss without prejudice the Third Cause of Action for Declaratory Relief. The City and Wavecrest agree that there is no statute of limitations that is currently running on this cause of action. The City and Wavecrest further agree that each party retains all of its rights, claims, and/or affirmative defenses that it currently has or could assert regarding this cause of action and/or the parties' dispute over the meaning of Section 8(d) in the Development Agreement, and shall be entitled to seek a judicial declaration at anytime regarding such matter.

7. Measure A Allocations. Section 11(c) of the Development Agreement provides that the City shall issue a total of 226 Measure A allocations for the Project, pursuant to the Phasing Plan set forth in Exhibit "L" to the Development Agreement.

The parties agree that this provision of the Development Agreement shall be implemented as follows:

(a) Within 5 calendar days after full execution of this Agreement, the City shall issue to Wavecrest certificates for thirty-five (35) 2004 Measure A allocations and eleven (11) 2005 Measure A allocations ("46 Measure As"). With these 46- Measure As, the City will have issued a total number of 181 Measure A allocations to Wavecrest through 2005. With the additional 36 density bonus units (Measure A exempt included in the Modified Project), the total number of units that could be built in the Modified Project without further Measure A allocations is 217. The Modified Project currently includes 217 units.

(b) The parties agree that, notwithstanding anything to the contrary in the Development Agreement, the City shall not be required to issue any additional Measure A allocations to Wavecrest for the Project or the Modified Project unless and until the Modified Project is approved by the Coastal Commission with more than 217 units. In the event that the Coastal Commission approves the Modified Project with more than 217 units, the City's issuance of further Measure A allocations under the Development Agreement for such additional units shall be reallocated in equal pro rata allotments over a period of two years from the date of Coastal Commission approval of the Modified Project.

(c) In the event that Wavecrest does not require any further Measure A allocations because the number of residential units approved by the Coastal Commission is less than the allocations required by the Development Agreement, Wavecrest hereby waives all rights and claims regarding those unnecessary Measure A allocations.

(d) As used in this Paragraph 7, "approves, approval of, approved by" the Coastal Commission means a final approval no longer subject to legal challenge or review.

8. Joint Press Release. The City and Wavecrest agree that, following execution of this Agreement, they will issue a joint press release in the form attached hereto as Exhibit D.

9. Execution Not an Admission. By entering into this Agreement, no party hereto admits that the claims or contentions of the other were or are valid or meritorious. Each party hereto has in the past denied and continues to deny the claims, assertions, allegations and contentions of the others and this Agreement is strictly for the purposes of compromising a dispute. Notwithstanding any provision of this Agreement to the contrary or otherwise, each party retains the right to seek a judicial declaration as to the meaning of any term or condition of the Development Agreement even if such issue was presented, alleged or referenced in the Action; provided, however, that this Settlement Agreement shall remain in full force and effect notwithstanding any such judicial declaration.

10. Advice of Counsel. The undersigned and each of them hereby declare and represent that in effecting this Agreement, each has received full legal advice as to their respective legal rights and each hereby certifies that he, she or it has read all of this Agreement and fully understands the same.

11. Additional Documents and Instruments. Each of the parties hereto agrees to execute and deliver to each of the other parties hereto all additional documents, instruments and agreements required to take such additional actions as are required to implement the terms and conditions of this Agreement.

12. No Assignment. The parties represent that they have made no assignment of the claims released herein, and that no signature other than those set forth below is required to effectuate this Agreement, including the release set forth herein. Each party shall indemnify each other party, defend and hold it harmless from and against any claims based upon or arising in connection with any prior assignment or transfer, or any such purported assignment or transfer, or any claims or other matters released or assigned herein.

13. Binding on Successors or Assigns. The parties agree that the parties' respective obligations and benefits arising out of the Agreement, and each of the terms of this Agreement, shall be binding upon and shall inure to the benefit of any successors and assigns of each party.

14. Applicable Law. The parties hereby agree that this Agreement is made, executed and entered into and is intended to be performed within the State of California and that this is a California agreement and is to be construed as such.

15. Integration. This Agreement contains the entire agreement and understanding concerning the settlement of the matters herein and supersedes and replaces any prior negotiations and agreements between the parties, whether written or oral. The Exhibits and Recitals are incorporated into the Agreement as if set forth herein in full. Each of the parties acknowledges representation by counsel throughout all of the negotiations which preceded the execution of this document and the document has been executed with the consent and upon the advice of counsel. Each of the parties acknowledges that no party or agent or attorney of any other party has made any promise, representation, or warranty, express or implied, not contained in this Agreement, to induce the other party to execute this instrument. The Development Agreement remains in full force and effect without amendment or modification. Nothing in this Settlement Agreement modifies or amends the Development Agreement, and any modification or amendment to the Development Agreement must be in accordance with the requirements of the Development Agreement.

16. Warranty of No Undue Influence. The parties hereby warrant and represent that they are not aware of any duress, menace, fraud, coercion, or undue influence which has caused any party to enter into this Agreement. Each of the parties hereby warrants and represents that it is not aware of any acts or conduct by which, in

executing this Agreement, the mind of any of the parties hereto has been overcome by the will of another person.

17. Attorneys' Fees and Costs.

(a) Fees and Costs Already Incurred. Except as provided in subsection (b), each party shall be responsible for its own costs, attorney's fees, and expert witness fees, incurred in connection with the Action and this Agreement.

(b) Proceedings to Enforce Agreement. In any proceeding at law or in equity to enforce any of the provisions or rights under this Agreement, the prevailing party shall be entitled to recover from the unsuccessful party all costs, expenses and reasonable attorney's fees incurred in the enforcement proceeding by the prevailing party (including without limitation such costs, expenses and fees on any appeals) and if such prevailing party shall recover judgment in any such action or proceeding, such costs, expenses, including those of expert witnesses, and attorney's fees shall be included in and as part of the judgment.

18. Authorization. Each person executing this Agreement warrants that he or she has full authorization to execute this Agreement on behalf of the entity he or she is signing on behalf of, and further represents that all necessary approvals have been obtained to execute and implement this Agreement.

19. Construction of Agreement. This Agreement shall be construed as if it were drafted by all parties.

20. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original instrument.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

Dated: \_\_\_\_\_, 2005

CITY OF HALF MOON BAY, CITY COUNCIL  
OF THE CITY OF HALF MOON BAY

By \_\_\_\_\_  
Mayor

APPROVAL AS TO FORM:

MEYERS, NAVE, RIBACK, SILVER & WILSON

By \_\_\_\_\_  
Adam U. Lindgren City Attorney  
Attorneys for CITY OF HALF MOON BAY, et al.

Dated: \_\_\_\_\_, 2005

WAVECREST VILLAGE LLC,  
a California limited liability company

By: Concar Enterprises, Inc.,  
a California corporation,  
a Member

By: \_\_\_\_\_  
G. Lawrence Atkinson  
President

By: North Wavecrest Partners, L.P., a  
California limited partnership,  
a Member

By: WhiteStar LLC, a Florida  
limited liability company,  
its General Partner

By: \_\_\_\_\_  
Its: \_\_\_\_\_

By: Pepper Lane – Half Moon Bay, LLC,  
a California limited liability company,  
a Member

By: Pepper Lane Properties, Inc.  
a California corporation,  
its Managing Member

By: \_\_\_\_\_  
Myra Reinhard  
President

APPROVAL AS TO FORM:

MORRISON FOERSTER

By \_\_\_\_\_  
Anne E. Mudge  
Attorneys for Wavecrest Village LLC